Supreme Court, U.S.
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No. 07-978

IN THE
SUPREME COURT OF THE UNITED STATES

FITZROY BARNABY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether finding a person to be a sexual offender for committing an offense that requires no proof of sexual intent and when his acts are found by the trier of facts not to involve sexual motivation is harsh and irrational so as to violate the due process clause, Fourteenth Amendment to the United States Constitution.

PARTIES INVOLVED

Petitioner, Fitzroy Barnaby, was the defendant in the Circuit Court of Cook County, appellant in the Appellate Court of Illinois, First Judicial District, and petitioner in the Supreme Court of Illinois in a Petition for Leave to Appeal.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, First Judicial District, and respondent in the Supreme Court of Illinois in a Petition for Leave to Appeal.

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JUDGMENT BELOW

The Order of the Appellate Court of Illinois, First Judicial District, dated June 30, 2005 is attached as Appendix A to this Petition.

The denial of Petition for Leave to Appeal dated September 26, 2007 is attached as Appendix B to this Petition.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Fitzroy Barnaby, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming his conviction for unlawful restraint.

JUDGMENT AND OPINION BELOW

The Order of the Appellate Court of Illinois, First District dated June 30, 2005 is set out as App. A.

The Order of the Supreme Court of Illinois denying Petition for Leave to Appeal on September 26, 2007, Case No. 102295 is set out as App. B.

JURISDICTIONAL STATEMENT

Jurisdiction in the Appellate Court of Illinois, First District was based on Illinois Supreme Court Rule 603.

Jurisdiction in the Supreme Court of Illinois was based on Illinois Supreme Court Rule 603 and 615, which provides that appeals from final orders of the Appellate Court of Illinois, First District shall be taken to the Supreme Court of Illinois.

The judgment of the trial court was affirmed on June 30, 2005.

Petition for Leave to Appeal was denied on September 26, 2007.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under Rules 10(b), 12 and 13 of this Court.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

Defendant was convicted of unlawful restraint and sentenced to 1 year probation.

730 ILCS 150/2 requires a person to register as a sexual offender when convicted of offenses clearly involving sexual intent or attempt to do so. Such offenses are:

> 11-20.1 (child pornography); 11-6 (indecent solicitation of a child); 11-9.1 (sexual exploitation of a child); 11-15.1 (soliciting for a juvenile prostitute); 11-18.1 (patronizing a juvenile prostitute); 11-17.1 (keeping a place of juvenile prostitution); 11-19.1 (juvenile pimping); 11-19.2 (exploitation of a child); 12-13 (criminal sexual assault); 12-14 (aggravated criminal sexual assault); 12-14.1 (predatory criminal sexual assault of a child); 12-15 (criminal sexual abuse); 12-16 (aggravated criminal sexual abuse); 12-33 (ritualized abuse of a child).

The statute also requires registration of offenses that by their nature do not necessarily involve sexual intent, i.e.:

> (1.5) A violation of any of the following Sections of the Criminal Code of 1961, when the victim is a person under 18 years of age, the defendant is not a parent of the victim, and the

offense was committed on or after January 1, 1996.

10-1 (kidnapping); 10-2 (aggravated kidnapping); 10-3 (unlawful restraint); 10-3.1 (aggravated unlawful restraint).

(1.6) First degree murder under Section 9-1 of the Criminal Code of 1961, when the victim was a person under 18 years of age and the defendant was at least 17 years of age at the time of the commission of the offense.

In this case in it first Order of affirmance, the Appellate Court unanimously held on June 30, 2005 the statute was constitutional and was constitutionally applied. Then on August 17, 2005, the Appellate Court granted a Petition for Rehearing, and on February 1, 2006, withdrew its Rule 23 Order of June 30, 2005. Then on February 16, 2006, the Appellate Court entered an Order that read:

"1. This Court's order of February 1, 2006, withdrawing the Rule 23 Order filed in this case on June 30, 2005, is vacated;

2. This Court's Rule 23 Order filed on June 30, 2005, is reinstated;

> 3. This Court's order of August 17, 2005, granting the defendant's petition for rehearing is vacated; and
>
> 4. The defendant's petition for rehearing is denied."

As to reinstating the June 30, 2005 order, Justice Leslie South, who authored the original Rule 23 affirmance, dissented, stating:

> "I dissent. After hearing oral arguments in this case and reconsideration of the Registration issue, I am of the opinion that the Rule 23 Order which I initially filed as the authoring judge on June 30, 2005, should be withdrawn, and that the order granting the defendant's petition for rehearing should stand. Therefore, I must decline to sign on the instant order."

The Illinois Supreme Court delayed ruling on the Petition for Leave to Appeal in this case and then upheld the statute in People v. Johnson, 225 Ill.2d 573, 870 N.E.2d. 415 (Appendix C) and then denied Petition for Leave to Appeal in this case based on finding the statute constitutional.

These charges related to events that occurred at approximately 7:25 a.m. on Greenwood Road in Cook County.

On November 8, 2002, defendant was driving his car about 7:25 a.m. Miss Beata Wroblewski (Tr. 83) age 14 (Tr. 84), asserted that defendant stopped his car and tried to pull her into his car.

Defendant refuted this, asserting that she carelessly walked in front of his car and he verbally rebuked her, telling her to be more careful.

The trial judge rejected her testimony and found defendant not guilty of attempt kidnapping and child abduction. Defendant was found guilty of unlawful restraint in that he touched her arm.

As to crucial facts of the occurrence, i.e., whether the defendant stated anything to her, and if so, what was occurring when he allegedly stated something, she told different stories to different officers and told different versions in court. She testified defendant said to her, "Come here, little girl." (Tr. 117)

To the first officer (Makowski) she spoke to, she advised that the person said nothing to her. (Tr. 148) He testified:

> "Mr. Cohn: Q: Did the witness tell you, an auto approached from behind her. She heard a honk of the horn from this auto which stopped next to her, and having the right front passenger window open to see the driver who appeared to be the only person in the vehicle.

NOTHING WAS SAID BY THE DRIVER. The auto continued eastbound and turned into a driveway of a townhouse ... When she got to the driveway the auto pulled up and blocked her path. The subject got out and grabbed the upper left arm of the victim. Nothing was said....

Is that what she told you?

A: ... It sounds exactly how I wrote it in my report, so that is what she said, yes.

Q: She never told you that the offender said to her, Come here, little girl, Come here, little girl?

A: At that time, I don't believe so." (Tr. 162-163) (Emphasis added.)

She asserted the officer was wrong as to what she told him.

To Officer Medrys, she advised that the person said, Come here, little girl, after the car stopped. He testified:

"Q: And she told you that the car stopped and pulled in front of her and after the car stopped the person said, Come here, little girl.

Right?

A: Yes.

Q: She did not tell you that the statement, Come here, little girl, was made as the car was traveling, did she?

A: NO. I BELIEVE THAT IT WAS WHEN IT WAS STOPPED." (Tr. 148-149) (Emphasis added.)

In her testimony, she provided different versions. She testified what the person said was "Come here, little girl," as the car was driving past, not when the car was stopped. (Tr. 114)

As to whether Miss Wroblewski was detained, in summary, her testimony is that defendant grabbed her arm and she shook her arm and left. She testified:

"A: I just shook my arm and I ran across the street.

Q: When he grabbed you by the arm were you moved in any way?

A: No.

Q: Did he pull you in any direction?

A: Not -- no.

I don't remember.

Q: What did you do when he had hold of your left arm, your left bicep?

A: I shook my arm." (Tr. 93-94)

She testified:

"Now, when you say that this person got out of the car and grabbed your arm was it for less than a second that he touched your arm?

A: I don't remember.

Q: Was it for five minutes?

A: No.

Q: Was it for a second?

A: No.

Q: Well, how long was it?

A: I don't remember.

It happened so fast.

Q: Now, was this with one hand or with two hands?

A: One hand." (Tr. 113-114)

Nothing was stated when this occurred. (Tr. 142) Defendant only used one hand. (Tr. 113) He did not attempt to use the other arm. (Tr. 113) She testified:

"Q: He touched your arm for a second?

A: Longer.

Q: Two seconds?

A: Three seconds.

Q: Three seconds.

Had he used one hand?

A: Yes.

Q: Did he attempt to use the other hand?

A: No." (Tr. 123) (Emphasis added.)

Additionally, the decision upholding application of this statute to defendant is contrary to the finding of the trial judge on whether defendant's acts involved a sexual element.

The trial court found no sexual activity involved in the crime and stated that he saw no basis for having defendant register as a sexual offender. He stated:

> "And everything I've seen in this trial, I think, I said at the time, and I still think it's more likely than not Mr. Barnaby's intent when he did this was to chastise the girl for her careless pedestrian habit." (Tr.S. 14)
>
> "The overriding factor here in this decision is that there is a presumption of constitutionality of any statute. And I don't believe Mr. Cohn in your argument you've overcome that presumption.
>
> I will state however that I don't really see the purpose of registration in this case. I really don't." (Tr.S. 17)

RAISING THE FEDERAL QUESTION BELOW

This issue was raised in the trial court, on appeal to the Appellate Court of Illinois and the Supreme Court of Illinois.

REASON FOR GRANTING CERTIORARI

1.

Finding a person to be a sexual offender for committing an offense that requires no proof of sexual intent and when his acts are found by the trier of facts not to involve sexual motivation is harsh and irrational so as to violate the due process clause, Fourteenth Amendment to the United States Constitution.

There is no sexual content to the crime, there is no sexual content to the act (touch her arm for 2 or 3 seconds) and the trial judge believed:

> "And everything I've seen in this trial, I think, I said at the time, and I still think it's more likely than not Mr. Barnaby's intent when he did this was to chastise the girl for her careless pedestrian habit." (Tr.S. 14)

> "The overriding factor here in this decision is that there is a presumption of constitutionality of any statute. And I don't believe Mr. Cohn in your argument you've overcome that presumption.
>
> I will state however that I don't really see the purpose of registration in this case. I really don't." (Tr.S. 17)

The Illinois statute was upheld in People v. Johnson, 225 Ill.2d 573, 870 N.E.2d 415. Cases from other States conflict and demonstrate that the Illinois statute as applied to the facts here is unconstitutional.

Under the cases from other State courts, there is good reason to hold the Illinois statute as applied to the facts of this case is unconstitutional.

In Ohio, where the State has a provision similar to the Illinois provision here involved, the court held the statute unconstitutional where the State could not prove the kidnapping or unlawful restraint related to sexual activity. In finding application of the act to defendant to be unconstitutional, the court in Ohio v. Washington, 2001 WL 1415568, stated:

> "The issue of whether a defendant could be adjudicated a sexually orientated offender when the underlying offense was not committed with a sexual motivation was one of first impression in the court. The court acknowledged that the crime, abduction of a person under age 18, falls within the literal terms of the statute. The court noted that some of the other crimes listed in the statute--unlawful restraint, child stealing, and child enticement--also do not invariably have a sexual motivation.

> The legislative intent behind the sexual predator statute was to protect the public from sex offenders by informing the community of their presence, the court observed. This is a legitimate legislative goal, but it is not furthered by notifying the public of the presence of persons convicted of non-sexual crimes, the court reasoned. The court said it could not see how the public is protected from sexual offenders by adjudicating a defendant a sexually oriented offender on the basis of a crime that 'was in no way sexually motivated.' Therefore, the court held that there was no rational relationship between the governmental interest and the imposition of the sexually-oriented-offender label pinned on the defendant." (Id. at p. 4)

That is also true of Illinois law. Here, based on the findings of the trial court, application of the registration statute to defendant is unconstitutional.

A statute, such as the statute at issue here, was held unconstitutional as applied to a kidnapping where there was, as here, no sexual activity involved. Florida v. Robinson, 873 So.2d 1205, Supreme Court of Florida.

There that court held that procedural due process was violated by including him based on

facts of kidnapping in a class of sexual predator. The court held:

> "Designation of individual as sexual predator under Sexual Predators Act constitute deprivation of protected liberty interest on which individual may base claim that his right to substantive due process was violated, where such designation results in stigma as individual is subject to life-long registration requirement and failure to comply with registration requirements constitute third-degree felony. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 9; West's F.S.A. § 775.21."

Similar results were reached in People v. Bell, 778 N.Y.S.2d 837. The facts in Bell were set out by the court as follows:

> "On October 23, 1981 the Defendant was convicted of Kidnapping in the first degree, P.I., § 135.25[3], and related crimes. Mr. Bell was sentenced to a term of 20 years to life imprisonment. Briefly, he and two others attempted to rob a man outside of the man's apartment. The robbery was not successful and the intended victim was able to retreat back into his apartment, but in doing so he left his three year old daughter and his friend behind in the hallway. The friend talked his way out of the situation and left; the would-be robbers

took the child and then concocted a scheme to blackmail the victim and his wife. But this effort was foiled as well, the men were arrested, and the child was recovered without harm."

The New York court held the statute as applied to be unconstitutional. The court considered instructive the decision by the court in Ohio. The court stated:

"Earlier this year the Second Appellate District of the Court of Appeals of Ohio, citing *Washington*, agreed, and was more specific: 'Because we conclude that the application of the statutory requirement that Reine be classified as a sexually oriented offender, in a case in which it has been stipulated that his offenses were committed without any sexual motivation or purpose, is unreasonable and arbitrary, and bears no rational relationship to the purposes of the statute, we conclude that it offends the Due Process clauses of both the Ohio and United States constitutions.' "

The court concluded:

"So too here, Mr. Bell's automatic inclusion in the sex offender registry at some level is clearly 'unjust' and 'legally unsound.' None of Mr. Bell's actions in kidnapping the three year old child were done for the purpose of sexual victimization of the child, and there is no

> assertion that during the period in which she was held for ransom the child was in any way molested or sexually abused. Yet, he may be required to take a course and 'admit' to being something he is not. Clearly, to require him to register as a 'sex offender' is completely arbitrary and unreasonable, having no substantial relation to the public morals or general sexually-charged safety issues which the S.O.R.A. was enacted to safeguard against."

Here, as in the above cases, causing defendant to register would serve no purpose and would violate the due process clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner